

**ZONING BOARD OF APPEALS**

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web: [www.wellesleyma.gov](http://www.wellesleyma.gov)J. RANDOLPH BECKER, VICE CHAIRMAN  
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ZBA 2010-25  
Appeal of Patrick Cox  
100 Pilgrim Road

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Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, April 1, 2010 at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the appeal of PATRICK COX pursuant to the provisions of Section 8 and Section 15 of M.G.L. c. 40A, and Section XXIV of the Zoning Bylaw of the decision of the Planning Board to approve the Large House Review application for a proposed new house at 100 PILGRIM ROAD.

On March 15, 2010 the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

Presenting the case at the hearing was Laurence Shind, Esq.

The Board asked what Mr. Shind thought the standard for review would be for the Zoning Board of Appeals (ZBA). Mr. Shind said that the Board would have a de novo standard. He said that the request is that the Zoning Board reverse the Planning Board's Large House Review (LHR) decision or remand it back to the Planning Board to impose conditions. The Board said that the LHR bylaw only provides that conditions of the LHR decision may be appealed to the ZBA.

Mr. Shind said that he was representing Patrick Cox (the "Appellant"), who is the direct abutter to the left at 96 Pilgrim Road.

Mr. Shind said that he sent a detailed memorandum when he filed the Appeal. He said that the Appellant believes that the developer's main argument in his Appeal to the ZBA (ZBA 2009-85) was an erroneous interpretation of the Zoning Bylaw.

Mr. Shind said that the bylaw for Large House Review that was added by Article 3 at the November, 2007 Special Town Meeting established thresholds for Design Board Review (DRB) and Planning Board review of large scale residential additions and construction. He said that the bylaw was designed to combat mansionization and out of scale buildings in residential areas. He said that the thresholds are based on the Zoning districts and are defined by the acronym, TLAG, Total Living Area plus Garage.

Mr. Shind said that the original application was for a house with a TLAG of 5,100 square feet. He said that TLAG was subsequently reduced to 4,714 square feet. He said that after three hearings, the Planning Board voted unanimously to deny the application on September 30, 2009. He said that after the developer

appealed to the ZBA, the petition was remanded back to the Planning Board. He said that the Planning Board reversed its original vote and voted approval on February 3, 2010.

Mr. Shind said that the bylaw establishes certain criteria and standards for the Planning Board to apply when considering applications for LHR. He said that the issues of Preservation of Open Space and Scale of Buildings are involved in this petition.

Mr. Shind said that the proposed structure fails to comply with LHR standards. He read a portion of the Zoning Bylaw regarding Scale of Buildings under LHR. He said that the existing house is 2,070 square feet. He said that the proposed house is more than double the size of the existing house.

Mr. Shind said that the TLAG on record for the proposed house is 4,714 square feet. He said that the number should be closer to 4,800 square feet. He said that the Appellant believes that the intent is to finish the attic, which would bring the number closer to 5,000 square feet.

Mr. Shind said that the Planning Board determined that the structures in the vicinity of the proposed house have a median total living area of 2,700 square feet. He said that the proposed house is approximately 60 percent larger than the median. He said that the Planning Board, in its initial denial of the application, found that the scale of the proposed house would not be consistent with abutting properties and with all of the properties from Linwood Road to Rutgers Road. He said that a total number of 15 houses on Pilgrim Road were included in the survey.

Mr. Shind said that the original denial by the Planning Board noted that the proposed building's height was significantly higher than abutting properties. He said that the Planning Board summarized the problems with the proposed height stating that, coupled with the size of the lot which is just over the 15,000 square foot threshold, would create an overly large visual impact.

Mr. Shind said that the Appellant believes that the proposed house fails to meet Open Space standards. He read a portion of the Zoning Bylaw regarding Open Space under LHR. He said that the Planning Board found that the proposed structure would compromise open space and that the depth and height of the structure would compromise the visual amenities of open space for persons overlooking the property from nearby properties. He said that the proposed structure will significantly increase lot coverage from 11 percent to almost 19 percent. He said that there is also a large patio in the design that will add impervious surface.

Mr. Shind said that there were a total of five hearings at the Planning Board level. He quoted Planning Board members' comments in support of the initial denial of the application. He said that the Planning Board's subsequent approval on February 3, 2010, after denying the same proposal on September 30, 2009, was a failure to correctly apply the LHR bylaw. He said that the stated grounds for the initial denial was that the proposed structure failed to meet the scale of buildings and open space standards. He said that on February 3, 2010, with the same proposal and plans before them, the Planning Board reversed its prior decision without providing any basis or explanation. He said that the record of the hearing when the application was approved shows that the Planning Board still had the same concerns as before.

Mr. Shind said that rather than imposing conditions that would address the Planning Board's concerns, the approval issued subject to some standard conditions that are contained in almost all LHR approvals. He said that the conditions dealt with minor landscaping.

Mr. Shind said that the applicant's prior argument to the ZBA on October 10, 2009 provides an incorrect interpretation of the LHR bylaw. He said that it ignores the Legislative intent and the actual language of the bylaw. He said that the applicant's argument on October 10, 2009 was that the LHR bylaw does not give the Planning Board authority to deny applications but rather that they only have authority to approve an application with conditions.

Mr. Shind said that the applicant also argued that the Attorney General's standard form approval letter compared the new LHR to Site Plan Review, where denial is only merited in certain circumstances. He said that Chapter 40, Section 32 gives the Attorney General the authority to approve or reject local Zoning bylaws, not to modify them. He said that the Attorney General approved the LHR bylaw, as written. He said that the language that requires the Planning Board to disapprove a project because it does not satisfy bylaw standards is what the ZBA must apply to the case before it.

Mr. Shind said that the developer's interpretation would ignore the record of five Planning Board hearings which demonstrate the application's failure to comply with the standards that are laid out in the bylaw.

The Board asked where the area savings was when the square footage was reduced from 5,100 to 4,714. Mr. Shind said that he did not have that information.

The Board said that the attic is not shown in the TLAG calculations. The Board said that there was a letter to the DRB on August 17, 2009 to clarify unfinished attic space. The Board said that the attic that is shown has a staircase up from the second floor.

Mr. Shind said that the left elevation of the proposed house is consumed with wall and with very few windows.

The Board said that not all of the plantings listed in the Landscape Designer's letter are screening plants.

The Board said that it was concerned about ZBA authority and procedure in this matter. The Board said that this matter concerns LHR and is not a Section 6 permit. The Board said that, had it not been for LHR, the proposed house could be built as a matter of right. The Board said that the intent of the bylaw was not to prevent large houses from being built but to have some control over them.

Mr. Shind said that Mr. Cox is requesting relief from the Planning Board's unwarranted reversal of its prior denial. He said that Mr. Cox is asking the ZBA to either overturn that approval or once more remand the matter to the Planning Board for the imposition of conditions that would address their prior grounds for denial. He said that the Appellant believes that the decision was an abuse of the Planning Board's discretion. He said that the Planning Board voted in opposition to its findings.

Gavin Cockfield, Esq., said that he represents Mr. Sohani, the property owner. He said that Mr. Sohani has lived in the existing home for 3.5 years. He said that casting his client as a developer reflects on him in a negative way.

Mr. Cockfield said that he thought that the matter should be a de novo review, which has the standard of finding facts. He said that it is not a record review. He said that the record that was before the Planning Board is not admissible. He said that the appealing party has to submit evidence from which the ZBA finds facts. He said that once the ZBA finds facts such as the size of the house and the size of the houses in the vicinity, the Board has to decide the legal standard as to whether the Planning Board abused its discretion. He said that the Board has to decide if there was no reasonable way for the Planning Board to reach its decision. He said that other than Mr. Shind's testimony, there was no evidence for the hearing.

The Board said that Mr. Cockfield was applying a Chapter 40A, Section 17 standard for an appeal that would go to Land Court. The Board said that standard may not apply to this kind of appeal.

The Board discussed de novo reviews.

Mr. Cockfield discussed the purpose of TLAG under the bylaw. He said that it is a threshold to determine whether LHR is triggered. He said that once the TLAG threshold is triggered, the Planning Board has to apply standards. He said that TLAG is not mentioned in the standards for review. He said that the interior of the house is no longer looked at. He said that the Planning Board looks at the appearance of mass of the structure and how it will look from the street.

Mr. Cockfield said that this is the 10<sup>th</sup> night that his client has come in for municipal review. He said that the proposal is for a single family house that is allowed by right on a conforming lot.

Mr. Cockfield said that the Attorney General has to determine if a bylaw that is adopted by a Town is valid or not. He said that the Attorney General did approve the bylaw but stated that he would construe it to be similar to Site Plan Review. He said that is not a creation of Chapter 40A, Section 17. He said that the Court said that, only in rare circumstances, can you deny a project that is put through Site Plan Review. He said that the process is designed to assure compliance with certain standards. He said that in this case it would be to address conditions that would affect the outward appearance of the structure. He said that Town Counsel had written a letter that reached the same conclusion.

Mr. Cockfield said that the Planning Board did not abuse its discretion the second time around. He said that the Planning Board was not applying the correct standard the first time and it reached an incorrect conclusion because of that. He said that the Planning Board applied the correct standard the second time around. He said that the Planning Board imposed several conditions.

Mr. Cockfield said that TLAG and Total Living Area (TLA) are two different numbers. He said that he did not have a TLAG calculation for the existing house. He submitted pictures of 21 houses, one of which is 3 blocks away and the other 20 are within two blocks of the property. He said that they are all very large houses. He said that the proposed house is in scale with several other houses in the vicinity. The Board asked if all of the houses are in the same Zoning District.

Mr. Cockfield said that once it is agreed that the TLAG threshold has been triggered, the calculation does not matter. He said that the calculations were done by the Building Inspector.

Mr. Cockfield said that the Planning Board had to apply certain standards when it looked at this project. He said that one standard is Preservation of Landscaping. He displayed a Site Plan and photographs that showed the landscaping. He said that the winter vegetation between the property and Mr. Cox's is substantial. He said that all of the dense vegetated buffer will remain. He said that there are no plans to take down any trees that are regulated by the bylaw.

Mr. Cockfield said that the existing lot is flat and they do not propose to change any of the grades.

Mr. Cockfield discussed the Planning Board comment about the long wall on the left side of the house. He said that there will be five windows in that wall. He submitted a copy of the Architectural Plan, as modified. He said that the wall is broken up with the chimney and the walls are staggered. He said that there will be a covered porch in the front.

Mr. Cockfield said that the Planning Board has to apply the standard that there be architectural detail to break up the mass. He said that Mr. Sohani had the roof designed so that it will be several feet below the height limitation. He said that 50 percent of the other roof structures will be four feet below that. He said that the rooflines have been broken up to break up the massing.

Mr. Cockfield said that the first time that Mr. Sohani was before the Planning Board, the Board did not like the design and massing of the house. He said that one of the Planning Board comments concerned the location of the garage towards the street. He said that the garage was set back from the street to 36.7 feet, the house was narrowed and the building height was dropped from 35.5 feet to 34.8 feet in the revised plans.

Mr. Cockfield said that the Planning Board reviewed the standard for Open Space. He said that lot coverage was reduced from 19.9 percent to 18.7 percent. He said that in excess of 80 percent of the lot will not be covered. He said that it will comply dimensionally with the Zoning Bylaw.

Mr. Cockfield said that this house had two separate DRB reviews. He said that all but one member voted to approve the initial design. He said that the reduced sized house received unanimous approval from the DRB with no conditions. He said that the DRB commented that changing the pitch of the roof would detract from the look of the house.

Mr. Cockfield said that the Planning Board did impose conditions. He said that the Planning Board implied that Mr. Sohani would be required to build the smaller home with the 4,714 square foot TLAG.

Mr. Cockfield said that the applicant submitted a Landscaping Plan that addressed the Planning Board's concerns. He said that the Planning Board ultimately required that the existing fence remain to provide a visual buffer.

Mr. Cockfield said that, under the bylaw, if the third floor is storage and not living space, it is not counted in TLAG calculations. He said that if the homeowners want to change the use in the future, they will have to come back for LHR. He said that review would be triggered by the TLAG. He said that there will be one very small window in the attic that was added as a design feature. The Board said that there is also an attic window at the rear of the house.

Mr. Cockfield said that if the attic space is going to be finished, it will likely involve constructing dormers, which will change the external massing.

The Board if the applicant would object to a condition that the attic space cannot be converted to living space. Mr. Cockfield said that the applicant reduced the size of the house even though he felt that he did not have to do that. He said that the third floor is not proposed to be living area. Mr. Cockfield said that the ZBA has to decide whether the Planning Board abused its discretion by not putting that condition in its decision. He said that condition would contradict the bylaw. He said that the applicant is not willing to accept that condition. He said that it is an enforcement issue.

Mr. Sohani said that DRB had been concerned about a section of the attic that appeared to be able to be finished. He said that he went to his architect and was told that the area could not be finished because it is too low. He said that the height came down when the house was reduced from 5,100 square feet to 4,714 square feet. He said that the orientation of the attic was changed. The Board said that the DRB did not indicate which drawing they approved. Mr. Cockfield said that they approved both drawings.

The Board discussed TLAG calculations. Mr. Cockfield said that if the TLAG number was interpreted as a cap, the house size could not exceed the cap. He said that the standards in the bylaw would not mean anything if TLAG is a cap.

Mr. Cockfield said that the proposed house is just 6 or 7 percent over the threshold, approximately 400 square feet. He said that if the Town's objective was to limit the massing of structures, there are better ways to do it. He said that there are dimensional requirements that the proposed house will meet. He said that the proposed house is below all of the applicable thresholds for dimensional requirements.

Mr. Cockfield said that the bylaw was adopted to address standards for a larger house. He said that the process worked. He said that the size of the house was reduced, architectural features were added, and the landscaping and fencing will be maintained.

Mr. Cockfield said that the ZBA has to decide if the Planning Board erred in reversing its decision.

The Board said that, depending on the universe that is chosen, the average TLA for the Pilgrim Road area is 2,500 square feet. Mr. Cockfield said that the bylaw was written to apply standards to reduce the appearance of mass and to prevent large boxes that are out of place.

The Board said that the ZBA only has control over the conditions of the Planning Board decision or plan modifications. The Board said that the conditions that the Planning Board imposed relate to the massing of the house.

Mr. Shind said that the proposed house will be 11 percent over the TLAG threshold. He said that the lot size is just over the threshold for the 15,000 square foot district. He said that it is substantially over the TLAG threshold.

Mr. Shind said that the height of the house was reduced by less than one foot and the width of the house was reduced by two feet. He said that is not a substantial reduction.

Mr. Shind said that the Planning Board comments show that they did not like the original or the revised proposal. He said that they were concerned with the scale and the lack of open space. He said that the Planning Board conditions had nothing to do with either of those concerns.

Mr. Shind said that there was a detailed review by the Planning Board that came up with the TLA calculation of 2,700 square feet. He said that included approximately 15 houses in what the Planning Board considered to be the neighborhood. He said that the proposed house will be substantially larger than the average house.

Jill Murmes, 14 Linwood Road, said that her garage is on Pilgrim Road. She said that she has a 4,100 square foot ranch home. She said that she has lived in town for 20 years. She said that she has attended several of the meetings for this property. She said that the revised plan does fit in better with the neighborhood. She said that it is a diverse neighborhood.

Bill Mone, 97 Elmwood Road, said that he has lived in town since 1979. He said that his property shares a common corner with the new construction. He said that he would support the original findings of the Planning Board. He said that the house will overwhelm the character of the neighborhood. He said that the Planning Board thought that it would dwarf Mr. Cox's house. He said that he was concerned about the looming nature of the structure and the loss of morning light. He asked that the Board consider that the conditions of the Planning Board decision will not mitigate the problems with the structure.

Dan Grace, 8 Linwood Road, asked that the guidelines be adhered to.

The Board said that the TLAG number in the bylaw is the trigger for LHR and is not an upper limit. The Board said that the bylaw is silent about dimensional requirements for LHR. The Board said that there are bylaw requirements for setbacks, building heights and lot coverage but those are not at issue in this case.

Jill Murmes said that the proposed house will be lower than what the guidelines allow for. She said that if Mr. Sohani built what he could build by right, it could be higher and wider. The Board said that Mr. Sohani has approval for the plan that is on the table.

Patrick Cox, 96 Pilgrim Road, said that Mr. Sohani has another home for sale in Wellesley. He said that Ms. Murmes is in the building trade. He said that he is appealing the decision because he feels that the proposed house is exactly what the town did not want in neighborhoods of this size. He said that the revised plans are worse for him as the abutting neighbor. He said that the roofline runs front to back. He said that there is a window in the front and one in the back. He said that he had an architect look at the plans. The architect said that there was no other reason to put the door at the top of the steps unless the intent is to finish the attic space.

Mr. Cox said that the volume of the house is just under 6,000 square feet with the garage. He said that it is a box with windows. He said that he intends to live in the neighborhood for quite some time.

Mr. Cockfield confirmed that the Board received the letter from Richard Crino, 107 Pilgrim Road.

Mr. Sohani said that he has lived in Wellesley since 1981.

The Board said that LHR was not meant to prevent larger homes but to regulate them. The Board said that the DRB and the Planning Board were designated to apply the standards. The Board said that the Appeal criteria does not give the ZBA guidelines. The Board said that it did not necessarily agree with Mr. Cockfield that this would be a Section 17 Appeal. The Board said that the ZBA heard the Appeal de novo and has to determine if the Planning Board abused its discretion. The Board said that the ZBA should give deference to the Planning Board and, as the bylaw is written, the decision should be affirmed.

The Board said that it is not making a finding. The Board said that the Planning Board has the prerogative in this case to make a determination. The Board said that changes were made in response to their comments and the Planning Board approved the plans. The Board said that the Planning Board did their due diligence in accordance with the bylaw. The Board said that it will be a dimensionally conforming structure.

The Board read the Appeals portion of the LHR bylaw. The Board said that the ZBA has the authority to hear an Appeal based on plan modifications. The Board asked how the ZBA could decide that a conforming structure does not comply with the decision that the Planning Board made. The Board said that there was nothing presented that seemed to suggest that the Planning Board erred.

#### Statement of Facts

The subject property is located at 100 Pilgrim Road, in a 15,000 square foot Single Residence District.

The Petitioner is appealing the decision of the Planning Board to approve the Large House Review application for a proposed new house at 100 PILGRIM ROAD.

#### Submittals from the Applicant

- Letter of Appeal to Kathleen F. Nagle, Town Clerk, dated 3/9/10, from Laurence D. Shind, Esq.
- Exhibit 1 – Approval Agreement for LHR-09-06 #100 Pilgrim Road, dated 2/16/10, signed by the Planning Board
- Exhibit 2 –
  - Title Sheet, TS, dated 6/8/09, prepared by HPA Design, Inc.
  - Proposed Elevations, A1.2, dated 6/8/09, prepared by HPA Design, Inc.
  - Proposed Floor Plans, A1.1, dated 6/8/09, prepared by HPA Design, Inc.
  - Large House Review Calculation, A1.3, dated 6/8/09, prepared by HPA Design, Inc.
  - Photos, Z1.4, dated 6/8/09, prepared by HPA Design, Inc.
  - Proposed Building Elevations, Z1.3, dated 6/8/09, prepared by HPA Design, Inc.
  - Proposed Basement Plan and Proposed Unfinished Attic, Z1.2, dated 6/8/09, prepared by HPA Design, Inc.
  - Proposed Floor Plans Large House Review Calculation, Z1.1, dated 6/8/09, prepared by HPA Design, Inc.
- Exhibit 3 –
  - Title Sheet, dated 6/8/09, revised 9/14/09, prepared by HPA Design, Inc.



- Proposed Conditions
- Proposed Floor Plans Large House Review Calculation, dated 6/8/09, revised 9/14/09, prepared by HPA Design, Inc.
- Proposed Building Elevations, dated 6/8/09, revised 9/14/09, prepared by HPA Design, Inc.
- Proposed Basement Plan Proposed Unfinished Attic, dated 6/8/09, revised 9/14/09, prepared by HPA Design, Inc.
- Site Plan, dated 6/4/09, prepared by Drake Associates, Inc.
- Exhibit 4 - Denial – LHR-09-06 #100 Pilgrim Road, dated 10/8/09
- Exhibit 5 – Wellesley Planning Board Regular Meeting and Public Hearing Minutes, Monday, January 4, 2010, approved by Meghan C. Jop, Planning Director
- Exhibit 6 – Letter to Laurence D. Shind, Esq., dated 3/10/10, from David Whitney, Architect

#### Decision

This Authority has made a careful study of the materials submitted and the information presented at the hearing.

The appeal of the decision of the Planning Board to approve the Large House Review application for a proposed new house at 100 PILGRIM ROAD is denied.

ZBA 2010-25  
Appeal of Patrick Cox  
100 Pilgrim Road

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J. Randolph Becker, Chairman

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Robert W. Levy

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David G. Sheffield

cc: Planning Board  
Inspector of Buildings  
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